STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: DECEMBER 13, 2022

IN THE MATTER OF:
Appeal Board No. 625248

PRESENT: MICHAEL T. GREASON, MEMBER

The Department of Labor issued the initial determination holding, effective May 10, 2021, that the wages paid to the claimant, a professional employee of an educational institution, cannot be used to establish a valid original claim during the period between two successive academic terms, on the basis that the claimant had reasonable assurance of performing services at the educational institution in the next academic term pursuant to Labor Law § 590 (10). The

claimant requested a hearing.

By decision filed June 16, 2022 (Appeal Board No. 621322), the Board rescinded the decision of the Administrative Law Judge filed February 8, 2022, and remanded the case to the Hearing Section for a further hearing and a decision on the remanded issue. The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the claimant and the employer. By decision filed August 5, 2022 (A.L.J. Case No.), the Administrative Law Judge sustained the initial determination.

The claimant appealed the Judge's decision to the Board.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant has worked as an annual, part-time faculty member at an accredited university since 1993. She is a union member and works pursuant to the terms of a collective bargaining agreement (CBA). As an annual

part-time faculty member, the claimant was afforded classes over the course of the academic year through the issuance of one letter of rehire for the school year.

Courses are based upon enrollment and can be cancelled as late as two weeks into the actual semester. The claimant earns $139.39 per credit hour or $12,545.00 per 90 contact hours for a course. If a course was cancelled, the employer would notify the claimant and the claimant would receive a cancellation fee pursuant to the terms of the CBA. If the claimant was not assigned three courses, the claimant could bump other faculty members for assignments.

In advance of the claimant's scheduling, the employer would confirm, via email, whether the adjunct faculty member would be resuming their employment each semester. Once confirmed, an email was issued listing the courses assigned as based upon enrollment projections. These "appointment letters" were sent by the employer's human resource office.

In the 2020-2021 academic year, the claimant taught two courses in the fall and one in the spring. The claimant's second spring 2021 course had been cancelled and after requesting a replacement course, the claimant was afforded one course to teach over the summer of 2021. The claimant filed a claim for unemployment insurance benefits on June 8, 2021, and her claim was made effective as of May 17, 2021.

In July 2021, the employer notified the claimant, by letter, that she would be teaching two courses in the fall. On August 13, 2021, the claimant received a telephone call followed by an email from the employer that the employer anticipated that the claimant would be teaching, instead, three classes for the fall 2021 semester due to high enrollment. The letter indicated that "The New School may cancel a course for various reasons and will inform you in the event a course is cancelled. The CBA stipulates what remedy, if any, will be made in the event of a course cancellation."

The employer's witness at the initial hearing was a senior human resource associate who has worked in the position for over 20 years. She handles unemployment insurance claims, payroll, and the benefits' office. She plays no role in the assignment of classes to the claimant and did not know the number of people necessary to run a class or the actual cancellation fee. The employer's different witness, offered at the remand hearing, was the assistant

vice-president of human resources, who oversaw the function of the human resource department. This witness also bore no first-hand knowledge of the terms of the claimant's employment including how courses were assigned, the type of courses that the claimant taught, whether the courses assigned to the claimant would be held, the numbers required for the school to hold a class and the methodology of bumping other faculty members. He denied that the budget had any effect on the scheduling of classes.

OPINION: NY Labor Law § 590 (10) requires that the weeks and wages earned by

an employee in a professional capacity for an educational institution be disregarded for purposes of determining whether such an employee is eligible to file a valid original claim for benefits during a period between academic terms or years if such employee had reasonable assurance of returning to work for an educational institution in the following semester or academic year. Reasonable assurance exists when an employing educational institution expresses a good-faith willingness to rehire a professional employee of an educational institution for the upcoming school year or term and the terms and conditions of the offer are not substantially less favorable to the claimant than in the prior year or term. It is the responsibility of the employer to demonstrate with competent testimony from knowledgeable witnesses concerning the employer's personnel practices and procedures that these basic conditions have been met. Absent proof that these conditions have been satisfied there is no reasonable assurance of employment in instructional capacity.

The United States Department of Labor Employment & Training Administration Unemployment Insurance Program Letter (UIPL) 5-17, dated December 22, 2016, gives further guidance with respect to interpreting the meaning of reasonable assurance under § 3304 (a)(6)(A)(i) - (iv) of the Federal Unemployment

Insurance Tax Act (FUTA). Pursuant to UIPL 5-17, in order for a claimant to have reasonable assurance in the following year or term, the offered employment must satisfy three prerequisites: (1) the offer of employment may be written, oral, or implied, and must be a genuine offer; that is, an offer made by an individual with actual authority to offer employment; (2) the employment offered in the following year or term, or remainder of the current academic year or term, must be in the same capacity; and (3) the economic conditions of the job offered may not be considerably less in the following academic year or term (or portion thereof) than in the first academic year or term (or portion thereof). The Department interprets "considerably less" to

mean that the economic conditions of the job offered will be less than ninety percent of the amount the claimant earned in the first academic year or term. To establish that there is reasonable assurance, the employer must demonstrate that the basic conditions of hire can be met through competent testimony and evidence from a knowledgeable witness concerning the employer's personnel practices and hiring procedures. (See Appeal Board Nos. 604638, 603168, 602352 and 569239 A).

The credible evidence fails to establish that the employer gave the claimant reasonable assurance of continued substantially similar employment in the 2021-2022 academic year. Although the claimant acknowledged receipt of the employer's letters of July 2021 and August 2021 as to the courses assigned for her to teach in the fall of 2021, her acknowledgment, alone, fails to demonstrate reasonable assurance. The claimant bears no first-hand knowledge of the actual intent of the employer as to her continued employment. Even the claimant's assumptions, based on past practices, do not satisfy the requirements of the statute that the employer must make an offer of reasonable assurance to the claimant for the next year or term. (See Appeal Board No. 598970 as citing Appeal Board No. 574936).

Further, to demonstrate reasonable assurance, the employer must demonstrate, through competent first-hand testimony and evidence, that the basic conditions of hire can be met. These witnesses must possess personal knowledge of the Department's hiring practices and procedures. Yet, the employer's witnesses bore no first-hand knowledge of the claimant, her prior assignments, the workings of the claimant's academic department and course assignments, the effect of enrollment of the course assignment, much less the workings of the bumping procedure or fee payment. These witnesses, without the requisite competency as to the assignment of courses, could not speak to the contingencies upon which the claimant's employment assignments would depend. (See Appeal Board Nos. 607729, 624665) Consequently, we may not rely on the employer's witnesses' testimony to establish the bona fides of the offers made to the claimant. Accordingly, we conclude that the claimant did not have reasonable assurance of continued employment of the PERIOD at issue, and therefore, the exclusionary provisions of Labor Law § 590 (10) do not apply.

DECISION: The decision of the Administrative Law Judge is reversed.

The initial determination, determination holding, effective May 10, 2021, that the wages paid to the claimant, a professional employee of an educational

institution, cannot be used to establish a valid original claim during the period between two successive academic terms, on the basis that the claimant had reasonable assurance of performing services at the educational institution in the next academic term pursuant to Labor Law § 590 (10), is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

MICHAEL T. GREASON, MEMBER